STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 12, 2007
v	No. 269692 Oakland Circuit Court
DANIEL ANTHONY AMARO, Defendant-Appellant.	LC No. 2006-206405-FH

Before: Davis, P.J., and Hoekstra and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of operating a vehicle under the influence of intoxicating liquor (OUIL), MCL 257.625(1)(a), third offense, MCL 257.625(6)(d), and driving while license suspended, MCL 257.904(3)(a). He was sentenced as a second habitual offender, MCL 769.10, to concurrent prison terms of 28 to 90 months for the OUIL conviction and six months for the driving while license suspended conviction. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant's convictions arise out of a drunk driving incident that occurred on January 2, 2006. Kiel Hearn, a tow truck driver, received a call from defendant, who stated that he had driven his car off an expressway into a ditch and needed to have it pulled out. Hearn met defendant at a nearby gas station, and defendant directed him to the car. Hearn notified the police when he noticed that defendant smelled of alcohol. Upon seeing the flashing lights of the police vehicle that appeared at the scene, defendant repeatedly asked Hearn to tell the police that he, defendant, had not been driving. Thereafter, the police arrested defendant and transported him to the police station. Two breathalyzer tests revealed that defendant's blood-alcohol level was .14.

Defendant's theory of defense was that he was not the driver of the vehicle. Defendant testified that his brother called him to pick up the vehicle because his brother had driven it into the ditch. His brother did not want to pick up the vehicle himself because he had problems complying with his probation requirements and did not want to draw attention to himself by retrieving the car. Defendant saw the car in the ditch when his roommate drove him to the area and dropped him off at a nearby restaurant where he ate dinner and had a few drinks before attempting to retrieve the car. Defendant denied telling Hearn that he was the person who had driven the vehicle into the ditch and denied asking Hearn to tell the police that he had not been driving.

Defendant first argues that the evidence was insufficient to support his OUIL conviction. We disagree. When determining whether sufficient evidence exists to support a conviction, a court must view the evidence in the light most favorable to the prosecution and determine whether a rational factfinder could conclude that the prosecutor proved every element of the crime charged beyond a reasonable doubt. *People v Sherman-Huffman*, 466 Mich 39, 40-41; 642 NW2d 339 (2002); *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000). A reviewing court must draw all reasonable inferences and make credibility determinations in support of the jury verdict. *Id*. at 400. The elements of an offense may be proven by circumstantial evidence and reasonable inferences therefrom. *People v Solmonson*, 261 Mich App 657, 661; 683 NW2d 761 (2004). "'Even in a case relying on circumstantial evidence, the prosecution need not negate every reasonable theory consistent with the defendant's innocence, but need merely introduce evidence sufficient to convince a reasonable jury in the face of whatever contradictory evidence the defendant may provide.'" *People v Hardiman*, 466 Mich 417, 423-424; 646 NW2d 158 (2002), quoting *People v Konrad*, 449 Mich 263, 273 n 6; 536 NW2d 517 (1995).

MCL 257.625 provides, in relevant part:

> (1) A person . . . shall not operate a vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles . . . if the person is operating while intoxicated. As used in this section, "operating while intoxicated" means either of the following applies:
>
> (a) The person is under the influence of alcoholic liquor . . . .
>
> (b) The person has an alcohol content of 0.08 grams or more per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine . . . .

Thus, in order to convict a defendant of OUIL, the prosecutor must prove that the defendant operated a vehicle while intoxicated or under the influence of liquor. Defendant argues that the prosecutor failed to prove that he, rather than his brother, was the operator of the vehicle.

Although the prosecutor presented no direct evidence that defendant was the driver of the vehicle, the prosecutor presented sufficient circumstantial evidence to allow a rational factfinder to reach such a conclusion. The evidence showed that defendant called Hearn from a gas station, stating that he had driven off the expressway into a ditch and needed to have the car pulled out. When Hearn arrived at the gas station to pick up defendant, defendant told him that he had driven off the road because it was slick and he "didn't quite make the turn." Defendant directed Hearn to the vehicle, and Hearn noticed that defendant appeared drunk and called the police. Although defendant remained in Hearn's truck while Hearn went into the ditch to observe the vehicle, defendant's shoes were wet and appeared muddy. According to Hearn, the vehicle was in a "wetlands-type area," and it was wet and muddy around the vehicle. When defendant saw the lights of the police vehicle flashing behind the tow truck, he asked Hearn to tell the police that he had not been driving.

Moreover, when Farmington Hills Police Officer Anthony Bateman arrived at the scene, defendant told him that his brother had dropped him off to pick up the car. Defendant admitted that he had been drinking and he appeared to have been drinking. Thereafter, defendant changed

his story regarding how he had arrived at the scene. Defendant was also carrying the keys to the car, his shoes were wet, and his shoes and hands were somewhat muddy. Bateman noticed that it was wet and muddy near the vehicle in the ditch. In addition, two Breathalyzer tests conducted after defendant had been arrested and taken to the police station revealed a blood-alcohol level of .14. The evidence and reasonable inferences arising therefrom supported the conclusion that defendant drove the vehicle into the ditch while he was intoxicated. Accordingly, the prosecutor presented sufficient evidence to support defendant's OUIL conviction.

Defendant next contends that he was denied the effective assistance of counsel because defense counsel failed to investigate a key witness and obtain civilian clothes for defendant to wear during trial. We disagree. Because defendant failed to raise this issue in a motion for a new trial or evidentiary hearing in the trial court, this Court's review is limited to errors apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). "'Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law.'" *Id.*, quoting *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). To establish a claim of ineffective assistance of counsel, a defendant must demonstrate that his counsel's performance fell below an objective standard of reasonableness and that counsel's representation so prejudiced the defendant that it deprived him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). With respect to the prejudice requirement, a defendant must demonstrate a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). A defendant must also overcome the strong presumption that counsel's actions constituted sound trial strategy. *Toma*, *supra* at 302.

Defendant argues that defense counsel never attempted to contact a key witness who defendant brought to counsel's attention and that counsel expected defendant to contact the witness himself while incarcerated. Defendant relies on a letter addressed to him from his trial counsel, but the letter was not submitted below and thus cannot be considered by this Court because it is impermissible to expand the record on appeal. *People v Powell*, 235 Mich App 557, 561 n 4; 599 NW2d 499 (1999). In any event, the witness who defendant argues defense counsel should have called to testify at trial is Vincent Conte, defendant's roommate who he alleged drove him to a restaurant near the ditch after defendant's brother asked him to retrieve the car. Defense counsel's decisions regarding what evidence to present and whether to call certain witnesses at trial are presumed to constitute trial strategy, and this Court will not review such decisions with the benefit of hindsight. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004).

Further, given the overwhelming evidence against defendant, he cannot show that but for counsel's failure to call Conte as a witness, the result of the proceeding would have been different. *Toma*, *supra* at 302-303. Defendant twice told Hearn that he drove the car into the ditch himself and repeatedly asked Hearn not to tell the police that he had been driving. Hearn had not met defendant before that night and had no reason to lie. In addition, it was wet and muddy near the car in the ditch, and defendant's shoes were wet and muddy. Because defendant testified that he never went into the ditch, this evidence was unrefuted. Moreover, Officer Bateman testified that defendant kept changing his story regarding how he had arrived at the scene. Thus, considering the substantial evidence against defendant, he has failed to demonstrate

that a reasonable probability existed that the result of the proceeding would have been different had counsel called Conte to testify. *Id*.

Defendant also argues that counsel was ineffective for failing to obtain civilian clothes for him to wear during trial and that the trial court abused its discretion by allowing trial to proceed while he was wearing prison clothing. A trial court must grant a defendant's timely request to wear civilian clothing during trial. *People v Harris*, 201 Mich App 147, 151; 505 NW2d 889 (1993). Because defendant did not object to wearing prison clothing before the jury was empanelled, however, he waived his right to be tried in civilian clothes. *People v Turner*, 144 Mich App 107, 109; 373 NW2d 255 (1985). In any event, defendant has not established prejudice. Nothing in the record indicates that defendant wore prison clothing or clothing resembling prison attire during trial. Although defendant alleges that he wore prison clothing turned inside out, this assertion is not supported by the record. Even assuming that it is true, however, defendant has failed to establish prejudice. Three witnesses identified defendant as wearing a white shirt. Thus, it does not appear that his clothing was readily identifiable as prison clothing or that it prejudicially marked him as a prisoner. See *Harris*, *supra* at 152. Accordingly, even if defendant did not waive his right to wear civilian clothing at trial, he cannot demonstrate prejudice resulting from the attire worn during the proceedings.

Further, defense counsel was not ineffective for failing to provide defendant with civilian clothing to wear during trial. Defendant provides no authority and we have found none indicating that it was defense counsel's responsibility to furnish him with alternative clothing. Moreover, because it does not appear from the record that defendant's clothing could be readily characterized as prison attire, defendant has not demonstrated a reasonable probability that, but for counsel's alleged error, the result of the proceeding would have been different. *Toma*, *supra* at 302-303.

Affirmed.

/s/ Alton T. Davis
/s/ Joel P. Hoekstra
/s/ Pat M. Donofrio